No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

v.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Brief of Appellant

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant,
Helena, Montana.

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OTHER AUTHORITIES

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Brief of Appellant

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action for personal injuries by Elroy Carl Houle, an infant, by Wilbur Houle, his guardian ad litem, against Helena Gas and Electric Co., a corporation (R. pp. 2-10). Judgment on directed verdict for defendant entered (R. p. 17) and plaintiff appeals (R. pp. 143-146).

THE FACTS

The plaintiff is a sixteen year old boy (R. pp. 2, 10, 19).

At about 11:20 o'clock (R. pp. 22, 23, 24) on the night of January 11, 1928, plaintiff was walking on the *public* sidewalk on Ewing Street in the city of Helena, Montana, when he came in contact with a live wire "owned and maintained by the defendant" (R. pp. 10, 11).

The wire was on the *public* sidewalk (R. pp. 11, 20, 21, 38-41, 43, 50, 52). It was carrying an electric current of 2300 volts (R. p. 56).

The boy did not know of the wire being on the ground and there was nothing to indicate to him or warn him of its presence (R. pp. 20, 22, 28-30, 31, 32, 40).

Plaintiff was rendered unconscious, seriously burned and permanently injured by the electric current so conducted into his body (R. pp. 20-27).

This suit was to recover damages for the personal injuries so sustained. A trial was had. At the close of all the testimony the defendant moved for a directed verdict (R. p. 132). The trial judge granted the motion and plaintiff excepted to such ruling (R. p. 140).

QUESTION INVOLVED

The question presented is:

Should the motion for a directed verdict have been granted?

ASSIGNMENT OF ERRORS

The District Court erred:

1. In granting defendant's motion for a directed verdict in its favor (R. pp. 132, 140, 146);

2. In directing the jury to return its verdict in favor of the defendant (R. pp. 140, 146);

3. In giving and rendering judgment against the plaintiff on such verdict (R. pp. 17, 141, 146).

ARGUMENT

The granting of the motion for a directed verdict by the trial judge and the entry of judgment for the defendant herein, was, in effect, a finding that plaintiff had not made an *issue of fact* to go to the jury.

Cochran v. Davis, 118 Okl. 135, 247 Pac. 65

If there is any evidence in the case tending to prove the negligence charged,—if the record discloses but a single *issue of fact*, then the court cannot properly direct a verdict for the defendant.

See:

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 at p. 626

O'Dell v. So. Ry. Co., 248 Fed. 345

Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327 at p. 328

Three factors determine what *issues of fact* are presented, viz.: (1) the *pleadings*, (2) the *theory* upon which the case was tried, and, (3) the *evidence* introduced.

The plaintiff in his complaint, alleged the negligence of the defendant in general terms (R. pp. 2-10).

No demurrer or other objection was interposed thereto.

The defendant, in its answer, pleaded (1) the general issue and (2) an unprecedented wind storm (R. pp. 10-13).

The case was tried upon the theory that the doctrine of res ipsa loquitur is applicable (R. pp. 33, 35, 36, 133).

A prima facie case, under this doctrine, is admitted by the answer (R. pp. 10-13).

To explain and refute the presumption of negligence, thus arising under that doctrine, the defendant introduced evidence tending to show that its equipment was standard; that the defect in its wire was latent; that it had no knowledge of such defect; that it had no opportunity to discover or repair the defect and that an unprecedented wind storm caused the wire to be deposited on the sidewalk where plaintiff was injured.

See:

Kaemmerling v. Athletic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

The plaintiff introduced substantial evidence controverting each of the foregoing contentions and defenses.

Issues of fact were thus presented.

Summary

Appellant's contentions are:

1. The *test* for determining a motion for a directed verdict is as stated in the following cases, viz.:

Begert v. Payne, (C. C. A. 6th), 274 Fed. 784
Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141
Spiesberger v. Mich. Cent. R. Co., (C. C. A. 7th), 235 Fed. 864
Rochford v. Penn. Co., (C. C. A. 6th), 174 Fed. 81
Whitney Co. v. Johnson, (C. C. A. 9th), 14 F. (2d) 24
Standard Oil Co. v. Cates, (C. C. A. 4th), 28 F. (2d) 718

2. The doctrine of *res ipsa loquitur* is applicable.

See:

Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914 D 905
San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680
Colusa Parrot Min. Etc. Co. v. Monahan, (C. C. A. 9th), 162 Fed. 276
Memphis Consolidated Gas & Electric Co. v. Letson, (C. C. A. 6th), 135 Fed. 969
Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615 at pp. 616, 617

Salwiecz v. Rutland Etc. Co., (Vt. 1928), 142 Atl. 77

Downey v. City of Macon, (Mo.), 6 S. W. (2d) 63

Novak v. Borough of Ford City, (1928), 292 Penn. 537, 141 Atl. 496

Beman v. Iowa Electric Co., (Iowa), 218 N. W. 343

Johnson v. Marshall, (1926), 241 Ill. App. 80

Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610

Burns v. Holyoke St. Ry. Co., (1925), 253 Mass. 443, 149 N. E. 127

Central R. Co. v. Peluso, (C. C. A. 2nd), 286 Fed. 661

Boyd v. Portland Elec. Co., 41 Or. 336, 68 Pac. 810

Chaperon v. Portland Elec. Co., 41 Or. 39, 67 Pac. 928

Southwestern Tel. Etc. Co. v. Bruce, 89 Ark. 581, 117 S. W. 564

Webster v. Richmond Light Etc. Co., 158 App. Div. 210, 143 N. Y. S. 57

Rocca v. Tuolumne County Elec. Power & Light Co., 76 Cal. Ap. 569, 245 Pac. 468

Moglia v. Nassau Electric R. Co., 127 App. Div. 243, 111 N. Y. S. 70

Southwestern Tel. Co. v. Shirley, (Tex. Civ. A.), 155 S. W. 663

McCrea v. Beverly Gas Etc. Co., 216 Mass. 495, 104 N. E. 365

Potera v. City of Brookhaven, 95 Miss. 744, 49 So. 617

3. The fact that wires carrying a dangerous current of electricity have broken or become detached from their poles in the street or highway and caused injury raises a presumption of negligence.

See:

Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615

Wright v. Richards & Co., 214 Ala. 678, 108 So. 610

Rocca v. Tuolumne Co. Elec. Etc. Co., (1926), 76 Cal. Ap. 569, 245 Pac. 468

Burns v. Holyoke St. Ry. Co., (1925), 253 Mass. 443, 149 N. E. 127

Sanders v. City of Carthage, (1928 Mo.), 9 S. W. (2d) 813

Zinkiewicz v. Citizens Elec. & Ill. Co., 53 Pa. Super. Ct. 572

Lexington Utilities Co. v. Parker's Admx., 166 Ky. 81, 178 S. W. 1173

Potera v. Brookhaven, 95 Miss. 744, 49 So. 617

Mayor of City of Madison v. Thomas, 130 Ga. 153, 60 S. E. 461

See also:

San Juan Light Etc. Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680

Colusa Parrot Min. Etc. Co. v. Monahan (C. C. A. 9th), 162 Fed. 276

4. Negligence may properly be alleged in *general terms* in cases such as this when the facts pertaining to the causes of the injury are peculiarly

within the knowledge of defendant and are such that plaintiff cannot be expected to know them.

See:

Kaemmerling v. Athletic Min. & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

Deal v. U. S., (C. C. A. 9th), 11 F. (2d) 3

Geneva Mill Co. v. Andrews, (C. C. A. 5th), 11 F. (2d) 924

Tatum v. Louisville & N. R. Co., (C. C. A. 5th), 253 Fed. 898

Forquer v. North, 42 Mont. 272 at p. 280, 112 Pac. 439

Stewart v. Stone & Webster Eng. Corp., 44 Mont. 160 at p. 175

Baltimore & O. S. W. R. Co. v. Hill, (1925), 84 Ind. App. 254, 148 N. E. 489

Chaperon v. Portland Electric Co., 41 Or. 39, 67 Pac. 928

Nashville Inter. Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053

Smith v. Redman, (1927), 244 Ill. App. 434

Dotson v. Louisiana Cent. Lmbr. Co., 144 La. 78, 80 So. 205

Lykiardopoulo v. New Orleans Etc. Light Etc. Co., 127 La. 309, 53 So. 575

Washington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032

Fulton Inv. Co. v. Farmers Reservoir & Irr. Co., 76 Colo. 472, 231 Pac. 61

Stolle v. Anheuser-Busch Inc., 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001

Also see cases cited in,

Wallace v. U. S., 16 F. (2d) 309 at p. 312

5. The *general allegations* of negligence contained in plaintiff's complaint are sufficient to properly present all the issues of fact tried, especially in view of the fact that no demurrer or other objection was interposed to the complaint.

See:

Kaemmerling v. Athletic Min. Etc. Co., (C. C. A. 8th), 2 F. (2d) 574

Baltimore & O. S. W. R. Co. v. Hill, (1925), 84 Ind. A. 354, 148 N. E. 489

Smith v. Redman, (1927), 244 Ill. App. 434

Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 87

Chiles v. Ft. Smith Commission Co., 139 Ark. 489, 216 S. W. 11

Lykiardopoulo v. New Orleans & C. R. Light & Power Co., 127 La. 309, 53 So. 575

Watson v. C. G. W. Ry. Co., (Mo. 1926), 287 S. W. 813

Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053

Washington-Va. Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032

Dotson v. La. Cent. Lumber Co., 144 La. 78, 80 So. 205

Zinkiewicz v. Citizens Elec. & Ill. Co., 53 Pa. Super Ct. 572

6. The sufficiency of plaintiff's complaint, not having been tested by demurrer, cannot be challenged on motion for a directed verdict made at the close of the evidence.

See:

Conrad v. Wheelock, (D. C.), 24 F. (2d) 996

Smith v. Redman, (1927), 244 Ill. App. 434

Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 87

See also:

Schassen v. Columbia Gorge Motor Coach System, (Ore. 1928), 270 Pac. 530 at p. 532

Dodson v. City of Bend, 117 Or. 231, 242 Pac. 821

Donovan v. Chitwood, (Neb. 1928), 218 N. W. 587

Staff v. Wobbrock, (Minn. 1927), 214 N. W. 49

Lorenz v. Bull Dog Automobile Ins. Ass'n, (Mo. App.), 277 S. W. 596

Lander State Bank v. Nottingham, 37 Wyo. 50, 259 Pac. 181

7. Evidence having been introduced by both parties in this case with respect to matters which were material, the complaint will be treated as having been amended, when necessary to properly put such matters in issue.

See:

United Kansas Portland Cement Co. v. Harvey, (C. C. A. 8th), 216 Fed. 316

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680

Standard Oil Co. v. Brown, 218 U. S. 78, 30 S. Ct. 669, 54 L. Ed. 939

Norton v. Larney, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413
Whittaker v. U. S. F. G. Co., (D. C. Mont. Bourquin, J.), 300 Fed. 129
Bryson v. Gallo, (C. C. A. 6th), 180 Fed. 70
Coolot Co. v. Kahner & Co., (C. C. A. 9th), 140 Fed. 836
United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625
Aulback v. Dahler, 4 Idaho 654, 43 Pac. 322 at p. 323
Fitzgerald v. So. Pac. Ry. Co., 36 Cal. App. 660, 173 Pac. 91 at p. 92
Section 777 Title 28 U. S. C. A.
Section 9183 Revised Codes Montana (1921)
Blackwelder v. Fergus Motor Co., 80 Mont. 374, 260 Pac. 734
LaBonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 Pac. 631

8. Substantial evidence of defendant's negligence having been introduced the trial judge was not authorized to withdraw the case from the jury.

See:

Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615
Reynolds v. Iowa Southern Utilities Co., (C. C. A. 8th), 21 F. (2d) 958
Brown v. Kansas Natural Gas Co., (C. C. A. 8th), 299 Fed. 463
Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815
Salwiecz v. Rutland Light & Power Co., (Vt. 1928), 142 Atl. 77

Novak v. Borough of Ford City, (1928), 292 Pa. 537, 141 Atl. 496
Altman v. Atlantic Coast Line R. Co., (C. C. A. 5th), 18 F. (2d) 405
Schrull v. Phila. Suburban Gas & Elec. Co., 279 Pa. 473, 124 Atl. 141
Pricer v. Lincoln Gas & Elec. Light Co., 111 Nebr. 209, 196 N. W. 150
Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058
Arkansas Light & Power Co. v. Cullen, (1925 Ark.), 268 S. W. 12
Herbert v. Hudson River Elec. Co., 136 App. Div. 107, 120 N. Y. S. 672
Economy Light & Power Co. v. Hiller, 203 Ill. 518, 68 N. E. 72
Dugan v. Erie County Elec. Co., 241 Pa. 259, 88 Atl. 437
Boyd v. Portland Electric Co., 40 Or. 126, 66 Pac. 576
Crosby v. Portland R. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204
Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 91
Memphis Cons. Gas Etc. Co. v. Letson, (C. C. A. 6th), 135 Fed. 969
Quaker City Cab. Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327
Birsch v. Citizens' Electric Co., 36 Mont. 574 at p. 581, 93 Pac. 940

The Test in Determining Motion for Directed Verdict

In Begert v. Payne, (C. C. A. 6th), 274 Fed. 784, the court said:

"It is a commonplace that, upon a motion by a defendant for instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. *The credibility of witnesses is peculiarly for the jury.* If the plaintiff produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, *no amount of contradictory evidence would authorize the trial judge to take the question of its effect and weight from the jury* (citing authority); this rule being subject (so far as material here) only to the limitation that testimony contrary to reason or contrary to natural and physical laws cannot support a verdict (citing authority). A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion, to set the verdict aside. *The test is whether there is such an utter absence of substantial evidence as to make it his duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the court may think the conflict in testimony to preponderate in favor of defendant.* We deem it unnecessary to do more than refer to the decisions of this court (citing same). (Italics ours.)

See also:

Spiesberger v. Mich. Cent. R. Co., (C. C. A. 7th), 235 Fed. 864

In Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141, the Supreme Court reversed a judgment for a defendant, rendered on a directed verdict, saying in the course of the opinion:

> "in order to test the propriety of the peremptory instruction given by the trial judge we must bring into view the facts and the reasonable inference which tended to a different conclusion, and *where the evidence was in substantial dispute, must adopt a view of it favorable to plaintiff;* but of course we do this without intending to intimate what view the jury ought to have taken, had the case been submitted to it." (Italics ours.)

In Rochford v. Pennsylvania Co., (C. C. A. 6th), 174 Fed. 81, it is said:

> "The *credibility* of a witness is peculiarly a question for the jury, under proper instructions by the court (citing authority). Neither is the mere fact that there is a preponderance of the evidence in favor of the party moving for an instructed verdict enough to require the judge to take a case from the jury, even though it might justify a new trial (citing cases). If the plaintiff has produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, *no amount of contradictory evidence will authorize the*

trial judge to take the question of its effect and weight away from the jury (citing cases)." * * * *

"It was the duty of the trial judge, and also the duty of this court, when his action is assigned as error, to give the plaintiff the benefit of every fair inference, which might reasonably be drawn from the evidence by the jury, when guided by sound processes of reasoning and applicable principles of law." (Italics ours.)

See also:

Whitney Co. v. Johnson, (C. C. A. 9th), 14 F. (2d) 24

Standard Oil Co. v. Cates, (C. C. A. 4th), 28 F. (2d) 718

The Pleadings

The only pleadings in the case are the (1) complaint, (2) answer and (3) reply. *No demurrer or motion was interposed* to the complaint.

The pleadings were drafted and the case was tried by both parties (R. p. 33) upon the theory that the doctrine of res ipsa loquitur is applicable.

See:

Kaemmerling v. Athletic Mining and Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

The case "must proceed to the end upon the theory upon which it is constructed."

See:

Storm Waterproofing Corp. v. L. Sonneborn Sons, 28 F. (2d) 115 at p. 117

In MacVeagh v. Multnomah County, (Ore. 1928), 270 Pac. 502 at p. 505, it is said:

> "It is well settled * * * * that, when a cause has been heard upon a certain theory in the trial court, with the acquiescence of the parties litigant, it must be so continued on appeal."

THE COMPLAINT

The complaint, in substance, alleges that plaintiff, while on a *public* sidewalk where he had the right *to be*, was injured by coming in contact with a live wire of the defendant company, then on said *public* sidewalk where it had no right to be.

See:

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680
Colusa Parrot Min. Etc. Co. v. Monahan, (C. C. A. 9th), 162 Fed. 276

The negligence complained of is set forth in paragraphs 15, 18 and 20 of the complaint (R. pp. 6, 8, 9).

The complaint alleges the existence of certain duties owing from defendant to plaintiff, sets forth certain acts and omissions of defendant which caused the injury and, alleges "that all of the acts, omissions and conduct * * * * complained of on the part of the defendant were negligent" (R. p. 9), without defining the quo modo, or specifying the details or particulars of such negligence.

Negligence may be thus alleged in *general* terms.

See:

Forquer v. North, 42 Mont. 272 at p. 280, 112 Pac. 439

Stewart v. Stone & Webster Eng. Corp., 44 Mont. 160 at p. 175

Deal v. United States, (C. C. A. 9th), 11 F. (2d) 3

Geneva Mill Co. v. Andrews, (C. C. A. 5th), 11 F. (2d) 924

Kaemmerling v. Athletic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

Tatum v. Louisville & N. R. Co., (C. C. A. 5th), 253 Fed. 898

The acts and omissions upon which the negligence complained of is predicated are:

(1) Failure to provide against reasonable and probable contingencies (R. p. 8);

Permitting the charged wire:

(2) *to lie* so near the street as to come in contact with persons traveling thereon (R. p. 8);

(3) *to hang down* so near the street as to come in contact with persons traveling thereon (R. p. 8);

(4) *to be so near* the street as to come in contact with persons traveling thereon (R. p. 8);

(5) *to be upon* said public sidewalk (R. p. 6);

(6) *to remain* so near the street as to come in contact with persons traveling thereon (R. p. 8);

(7) *to remain upon* said public sidewalk (R. p. 6); and,

(8) failure to so maintain and use said wire so as not to injure plaintiff (R. p. 8).

In paragraph XV of the complaint (R. p. 6) it is alleged:

> "That * * * defendant * * * negligently * * * allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with such high and dangerous electric current * * * *to be* and *remain* upon said public sidewalk * * *" (R. p. 6). (Italics inserted.)

In paragraph XVIII of the complaint (R. p. 8) it is alleged:

> "That it * * * was the duty of defendant in * * * operating * * * its said plant * * * *to provide against all reasonable probable contingencies* and not to permit * * * said wire * * * *to lie, hang down, be* or *remain* so near the said * * * sidewalk as to come in contact with persons traveling thereon, * * * and it * * * was the duty of said defendant to so * * * maintain * * * said wire * * * so as not to injure the said Elroy Carl Houle, plaintiff herein, all of which things and duties the said defendant failed and omitted to do and perform" (R. p. 8). (Italics inserted.)

In paragraph XX of the complaint (R. p. 9) it is alleged:

> "Plaintiff further states that all of the acts, omissions and conduct herein complained of on the part of the defendant were negligent and careless acts and the proximate cause of plaintiff's injuries" (R. p. 9).

As was said in Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961 at p. 963:

> "The negligence of the defendant was in permitting a condition which sent the deadly current out of its usual zone of travel. It is not material what concurring cause or means set the dangers in motion, *unless the concurring means superseded the negligence of the defendant.*" (Italics ours.)

THE ANSWER

The answer of the defendant admits that the live wire in question was "owned and maintained by defendant"; that it "was broken" and fell to the ground; that plaintiff, while lawfully proceeding along the street, "came in contact with said wire, broken as aforesaid," and that plaintiff was thereby injured (R. p. 11).

A *prima facie* case of negligence against defendant is thus admitted in the answer.

In the recent case of Salwiecz v. Rutland Light & Power Co., (Vt. 1928), 142 Atl. 77, the court said:

> "The Vermont Hydro-Electric Corporation owned the transmission line. Its electricity escaped and injured the plaintiff. The proof of this established a prima facie case."

See also:

Chaperon v. Portland Electric Co., 41 Or. 39, 67 Pac. 928

Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359

Smith v. San Joaquin Light & Power Corp., (Cal.), 211 Pac. 843

Rocca v. Tuolumne County Elec. P. & L. Co., (1926), 76 Cal. App. 569, 245 Pac. 468

Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961

Reynolds v. Iowa So. Utilities Co., (C. C. A. 8th), 21 F. (2d) 958

THE REPLY

The plaintiff's reply simply puts in issue the new matter alleged in defendant's answer (R. p. 13).

A Prima Facie Case

The admitted facts and circumstances being such as to raise a presumption of negligence from the occurrence of the accident, under the doctrine of res ipsa loquitur, a prima facie case was made out entitling plaintiff to go to the jury.

See:

Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815

Minneapolis Gen. Elect. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345

Crosby v. Portland R. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204

Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576

Had no explanation or evidence tending to rebut the foregoing presumption been offered, then defendant's negligence would have been established

as a *matter of law* and plaintiff would have been entitled to a peremptory instruction on that issue.

See:

Potera v. Brookhaven, 95 Miss. 744, 49 So. 617

The defendant, however, saw fit to attempt to offer an explanation of the accident and thereupon the question of the defendant's negligence ceased to be a *matter of law* to be determined by the court and became a *matter of fact* to be determined *by the jury.*

See:

Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576

The Evidence

DEFENDANT'S EVIDENCE

At the trial the defendant submitted evidence to overcome the prima facie case against it and to exonerate it from liability. By this evidence defendant sought to explain the injury to plaintiff upon three grounds, viz.:

(1) That its equipment was standard and safe (R. pp. 76-96, 101-110) and that there was a latent defect in the wire (R. pp. 78, 79, 82, 94, 103, 106);

(2) That the defect in the wire arose so recently that defendant could not, by the exercise of proper care, have discovered or repaired it before the accident occurred (R. pp. 80, 81, 88-90, 97-100, 111); and,

(3) That the wire was deposited on the sidewalk by an unprecedented wind storm (R. pp. 56-76, 107, 108).

See:

Kaemmerling v. Atlantic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

PLAINTIFF'S EVIDENCE

The plaintiff, to rebut the foregoing, introduced upon three grounds, viz:

Equipment

(1) Defendant's equipment was not standard; its construction was poor and dangerous and by reason thereof the city of Helena is known among linemen as "a hot town" (R. p. 112); these defects were and are patent—so patent they could be seen from the window of the court room wherein the trial was had (R. p. 86); the defect in the particular wire in question was patent; the insulation was defective and worn and in spots entirely missing on the wire in question as long before the accident as October, 1926 (R. pp. 112, 113) subsequent thereto and even at the time of the trial the defective non-insulated spots had not been repaired (R. p. 87);

(2) An expulsion fuse connected to the circuit would have automatically shut off the current as soon as the wire fell to the sidewalk or became grounded and thus prevented the injury (R. pp. 114, 115, 118); no such fuses were provided or in use on the circuit in question (R. pp. 87, 95, 115).

The wire in question had been defective and had been giving off sparks for a long time prior to the accident (R. pp. 116, 117, 120); defendant had been notified of this condition *three* times by Mrs. Loble (R. pp. 127, 85, 112, 113, 116, 118, 119), *once* by Fred Cummings at 10:26 p. m. (R. p. 99) being about *fifty-four minutes before the injury*, next by some one at 10:50 p. m. (R. p. 99) being about thirty minutes before the injury; that notwithstanding, the defendant failed to turn off the circuit or repair the defect.

Electricity was escaping from defendant's wire along Ewing Street as early as 10:26 p. m. (R. p. 99) when the witness Cummings called defendant's trouble station (R. p. 47). Cummings then observed "intermittent flashes, like lightning" from the "wire that was out of order" on Ewing Street in the vicinity of the little store on the corner of Thirteenth and Ewing in the six hundred block and *southward* therefrom toward 411 North Ewing where plaintiff was injured (R. p. 46).

Plaintiff was injured at about 11:20 p. m. (R. pp. 22, 23, 24, 30, 37, 38, 52, 55), being almost an hour after defendant was notified of the defect.

After the plaintiff had been injured the witness Marion Lane followed the defective wire from 411 North Ewing Street to the little store on the corner of Thirteenth and Ewing Streets where the escap-

ing electricity had been observed by Cummings almost an hour before (R. pp. 28, 29).

Marion Lane testified on cross-examination:

> "I rode along down in the car as far as the little store. I do know that was the same wire because I followed it from my house down; *only one wire was down.* There are four or five wires on the poles in front of the house" (R. p. 29).

Again:

> "I did go down and saw no other wire sputtering on the ground. I said I got home a little after eleven" (R. p. 29).

The "intermittent flashes, like lightning" seen by Cummings at 10:26 p. m. and occasioned by electricity escaping from the fallen wire of defendant company were also observed, from about that time until plaintiff was injured at 11:20 p. m., by the witnesses (1) Steve Tomcheck (R. pp. 31-34), (2) Mrs. Tomcheck (R. pp. 37-39), (3) Elmer Williams (R. pp. 39-42), (4) Walter Yund (R. pp. 43, 44), and (5) Charlotte Loble (R. pp. 123-127).

Thereafter Mr. Loble telephoned defendant's substation that plaintiff was injured and requested the operator to kill the circuit (R. p. 98); the operator refused to shut off the circuit and referred Mr. Loble to the superintendent Mr. Bernier (R. p. 98). Loble then telephoned Superintendent Bernier, advising the latter that plaintiff had been injured by the wire and requested that the cur-

rent be turned off (R. p. 80). Superintendent Bernier "called the plant to find out where the men were working," etc., but *he did not order the current turned off* (R. p. 80). Shortly after that Loble called the operator at the plant *a second time* and wanted the circuit shut off but still the operator failed to turn off the current (R. p. 80). Thereupon and again Loble called the superintendent who testified:

> "He (Loble) was very excited that time and he said we must have the current turned off, that it was still sparking and on fire, when, for the first time, I realized there was some other wire besides the arc wire that was causing trouble; I then called up the plant and told them to kill the wire, and he did so" (R. p. 81).

The witness Tomcheck testified that the wire was still alive at approximately midnight (R. p. 54).

No Inspection

The defendant failed to make proper or any inspection of this circuit to ascertain patent defects therein. The defendant's superintendent testified:

> "It was inspected along in February or March *two years ago*, February or March, 1926. * * * no work had been done on the circuit previous to or since up to the time we had the trouble in 1928. Between February 1926 and January 1928, nothing had been done on this wire; *no inspection except the usual*

inspection made on traveling about the streets which is a common practice of everyone in the office to glance at the wires to see what happened." (R. p. 84.)

Again:

"I could not give you the exact date, when that primary wire that dropped January 11th, 1928 was inspected, if inspected at all, between February 1926, and January 11th, 1928" (R. p. 85).

In defendant's circuit along Ewing Street there are only *five* (5) wires (R. p. 95).

Numbered from the inside of the sidewalk, wire number two (2) is the one that became broken and fell to the sidewalk (R. p. 95).

Before operator Keller turned off the current superintendent Bernier called him and "asked him what was the trouble or apparent cause of the trouble, and he said Arc Circuit 5-2, meaning that the wire had been broken" (R. p. 80). The defendant knew exactly where the trouble lay. It knew that on this 5 wire circuit that wire number 2 was in trouble and before any of defendant's employees had arrived on the scene of the accident the current in the 2nd wire was turned off and when the superintendent arrived there the "wire was dead" (R. p. 88).

Defendant's own mechanical automatic device indicated trouble on this wire as early as 10:50 p. m. or *thirty minutes before* the boy was injured

and even then the current was not turned off until at least 11:30 p. m. or *ten minutes* after the injury and *forty minutes* after the automatic device rendered *notice* to defendant of the trouble (R. p. 88).

Unprecedented Wind Storm

The testimony of defendant's own witnesses shows that the wind storm of January 11, 1928, was not unprecedented. The U. S. Weather Bureau records indicate that there were at least *three* precedents for the storm in question (R. p. 57). These records indicate that there had been one other wind storm in which the maximum wind velocity equalled and two other storms where the maximum wind velocity exceeded that of the storm of January 11, 1928 (R. p. 62).

The records further indicate that the extreme velocity recorded on Jan. 2, 1913, exceeded that recorded on Jan. 11, 1928, by two miles per hour and that on two other occasions the extreme velocity approached to within one mile per hour of that recorded on Jan. 11, 1928 (R. p. 63).

Defendant's equipment and wires must be so maintained as to withstand not only fair weather but foul weather as well.

Merely because an injury occurs during a severe storm is not proof that such injury is a result of the storm. The storm may prove to be a concurring cause or means to set the already existing

danger in motion, but that can not relieve the defendant from liability unless this concurring means superseded the negligence of the defendant.

See

Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961 at p. 963

When an "unprecedented wind storm" is shown by defendant's own witness to have had three precedents it ceases to be unprecedented. It thereby loses its prestige, claim to fame and effectiveness as a defense. It then becomes merely a "severe storm" such as the trial judge testified to having experienced on the night in question when he "got up in the hotel" (R. p. 138).

Whether the plaintiff's injury was the result of defendant's defective equipment and negligence or whether it was the result of a big wind is a question for the jury to determine under proper instructions.

See:

Rocca v. Tuolumne County Elec. Power & Light Co., 76 Cal. App. 569, 245 Pac. 468

Even though a high wind may have caused the wire to have become disengaged from its fastenings at 10:26 o'clock p. m. when first observed by the witness Cummings, who then notified defendant, still, such fact will not excuse the defendant for its negligent conduct in permitting the charged wire *to be* upon the public sidewalk until the hour of 11:20 p. m. when plaintiff was injured.

Damage done to the wire by a high wind will not excuse the defendant for its negligence in keeping the current turned on after notice of the defect; nor in failing to turn off the current when notified, nor, in the defendant's failure to investigate the trouble and remedy the same until more than one hour had elapsed after it had received actual notice of the dangerous condition of the wire.

The defendant may not close its eyes to the danger of which it has notice. It was the defendant's duty *as a matter of law* to use reasonable care to prevent injury from the fallen wire and to forthwith turn off the current.

See:

Westerdale v. N. P. Ry. Co., (Mont. 1929), decided Jan. 21, 1929 (not yet officially reported)

In Lexington Utilities Co. v. Parker's Admx., 166 Ky. 81, 178 S. W. 1173, at p. 1175, the court said:

> "It is conclusively shown that the light company had notice of the break 20 minutes before the accident. *With knowledge of this fact, there was negligence in failing to shut the current off from the wire.* Knowledge of the break imposed upon the light company the duty of refraining from sending a current through the wire until it ascertained that it was safe to do so." (Italics ours.)

In Mayor of City of Madison v. Thomas, 130 Ga. 153, 60 S. E. 461 at p. 463 the court said:

"If the superintendent of the electric light plant received notice that the wire was down, and the electric current was then on, *he should have instantly turned the current off and kept it off*, until, after due investigation, the report was found to be untrue, or, if found to be true, until proper precautions were taken to prevent danger to persons or property from the fallen wire." (Italics ours.)

In Zinkiewicz v. Citizens Elec. & Ill. Co., 53 Pa. Super. Ct. 572 at p. 575 the court said:

"We need not cite authorities for the proposition that in view of the extraordinary care which such companies are bound to exercise *they would be responsible for the consequences of permitting a live wire to dangle upon the road after notice, actual or constructive, regardless of the causes producing such a condition.*" (Italics ours.)

Theory of the Case

As to the negligence charged there are two theories.

Counsel for plaintiff and defendant had one theory of the case. The trial judge had an entirely different theory of it.

The theory upon which the pleadings were drafted and the case tried by counsel was that the doctrine of res ipsa loquitur is applicable. In accordance with that theory plaintiff's complaint states *generally* the acts and omissions which he alleges to be the proximate cause of his injuries and avers that same were negligently done.

The trial court's theory was that the allegations of plaintiff's complaint are *not general* but that they are *specific* (R. pp. 133, 134); that the complaint "is very narrow" (R. p. 134); that "it alleges a single specific act of negligence on the part of the defendant" (R. p. 134) and that plaintiff's proof is limited and confined to this single specific act, viz: that defendant "negligently * * * * allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with such high and dangerous electric current * * * to be and remain upon said public sidewalk" (R. pp. 36, 37).

COUNSEL'S THEORY

The only times the phrase "res ipsa loquitur" appears in the record it was placed there by defendant's counsel (R. pp. 33, 35, 36, 133).

At the very beginning of the case defendant's counsel admitted his knowledge of plaintiff's theory of the case by stating to the court that plaintiff was "simply relying on the res ipsa loquitur doctrine" (R. p. 33).

By introducing evidence of standard equipment, latent defect, lack of notice and knowledge, lack of opportunity to discover and repair the defect, etc., defendant's counsel further indicated his knowledge of the doctrine and theory on which the case was tried.

If the allegations of negligence in the complaint

were not *general*,—if same were *specific*, why did defendant not confine its evidence to explaining and rebutting the *specific act* charged? Why go outside of the issue made by this *specific act* in presenting its defense?

The answer is obvious.

Counsel knew the complaint alleges negligence in *general* terms and that the doctrine of res ipsa loquitur is applicable.

Defendant's counsel knew the kind and character of defense required by the pleadings in this case and proceeded to and did present the proper and only defenses available to defendant.

See:

Kaemmerling v. Athletic M. & S. Co., (C. C. A. 8th), 2 F. (2d) 574 at p. 581

In Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610, the court said:

> "After plaintiff rested her case, defendants introduced evidence tending to show due care in inspection and management, and good condition of the wire and its insulation at the place of the accident.
>
> "After defendants rested, the plaintiff offered to prove by the witness Cantrell that, prior to and up to about the time of the accident, he had frequently observed the wires, where they ran through the branches of trees along where the accident occurred, 'sparking' and 'spitting fire,' and that the insulation was off. The court sustained objection to this evidence upon the ground that it was not in

rebuttal, holding that evidence of defective condition should have been offered as part of plaintiff's original case. In this the court was in error. *The plaintiff having made a prima facie case of negligence on that issue, the burden was on defendants to proceed with proof of due care.* The evidence of Cantrell was in rebuttal of such testimony." (Italics ours.)

While defendant was content to adopt the trial judge's *erroneous* theory that plaintiff's complaint was narrow and alleged but a single specific act of negligence, for the purpose of moving for a directed verdict (R. p. 132) yet defendant was not so willing to adopt this same *erroneous* theory when it came to making its record and presenting its defenses.

This occasioned the following remarks from the court, viz.:

"What is the purpose?" (R. p. 92).

"Well, it seems to be you are willing to go outside of the pleadings. The court has no objection." (R. p. 93.)

"Counsel for the defense insisted on bringing it in by the neck. I can see no objection to it." (R. p. 108.)

"For the same reason as before, the objection is overruled." (R. p. 108.)

"Counsel for defendant made it an issue. Objection overruled." (R. p. 109.)

See also record pages 35, 36, 100, 101, and 110.

From an examination of the record it will be seen that defendant adopted the correct theory in

presenting its case; that it was in no wise prejudiced in its defense and that it had and received all the benefits of such defense under the theory that the negligence of defendant is alleged in the complaint in *general terms* and that the doctrine of res ipsa loquitur is applicable.

In 20 C. J. p. 381 it is said:

> "The facts that defendant conducts electricity to a certain place; that electricity so employed may escape in such a way as to produce an injury; and that an injury from electricity is actually occasioned in a place where the injured party has a right to be are usually held to constitute a prima facie case of negligence."

In San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 98; 32 S. Ct. 399, 401, the court said, in referring to the doctrine of res ipsa loquitur:

> "When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

In Sweeney v. Irving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, it is said:

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*,—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence. * * * *

"In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; *that they make a case to be decided by the jury*, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury*

is, whether the preponderance is with the plaintiff." (Italics ours.)

(See also cases hereinbefore cited in paragraph 2 of the Summary of this brief.)

COURT'S THEORY

The trial court adopted the erroneous theory that there is but one single, specific act of negligence alleged in the complaint. However, it must be remembered that this specific act of negligence is then followed in the complaint by other and general allegations of negligence.

See:

Sanders v. City of Carthage, (1928 Mo.), 9 S. W. (2d) 813

After the plaintiff had rested, the defendant introduced evidence of other and different issues in the case. These issues, in the terms of the trial judge, were brought into the case, by the defendant, "by the neck" (R. pp. 108, 109).

They were then met by contradictory evidence offered on the part of plaintiff.

When so met they constitute *issues of fact.*

These issues so brought into the case are in for all purposes. Defendant may not place them in the record for one purpose and then rid itself of them for another purpose.

The defendant's evidence in support of these issues was, for the most part, introduced without objection. In view of this fact the complaint must

be deemed to have been amended, if necessary to properly put such matters in issue.

United Kansas Portland Cement Co. v. Harvey (C. C. A. 8th), 216 Fed. 316, holds that under Rev. St. Sec. 954 (now Sec. 777, Title 28, U. S. C. A.), which permits the amendment of pleadings to conform to the proofs, where evidence was introduced by both parties with respect to a matter which was material, the complaint will be treated as having been amended, when necessary to properly put such matter in issue.

In Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327, at p. 328, the court said:

> "Federal courts are very liberal in allowing amendments to prevent a miscarriage of justice."

See:

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 at p. 627

McDowell v. Kiehel, (C. C. A. 3rd), 6 F. (2d) 337

In San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680, the Supreme Court said:

> "The trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that

question; * * * * effect must therefore be given to the well-settled rule that *where parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.*" (Italics ours.)

See:

Standard Oil Co. v. Brown, 218 U. S. 78, 30 S. Ct. 669, 54 L. Ed. 939

Bryson v. Gallo, (C. C. A. 6th), 180 Fed. 70 at pp. 74, 75

Coolot Co. v. Kahner & Co., (C. C. A. 9th), 140 Fed. 836 at p. 839

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625

Whittaker v. U. S. F. G. Co., (D. C. Mont.), 300 Fed. 129

Ford v. Wabash Ry. Co., (Mo.), 300 S. W. 769

Smith v. Redman, (1927), 244 Ill. App. 434, was an action for personal injuries sustained by appellee when the seat in which she was sitting in appellant's theater collapsed. As in the instant case, the defendants pleaded the general issue and moved for a directed verdict on practically the same grounds relied upon by the defendant herein (R. p. 132).

The appellate court said:

"Appellants contend that the declaration does not state a cause of action because it does not aver that they had knowledge of the al-

leged defective condition of the seat or that by the exercise of reasonable care they would have known of such defective condition. They also insist that there is no proof in regard to those matters. They pleaded the general issue. *Had they desired to question the sufficiency of the declaration they should have demurred and abided by their demurrer. A motion* to exclude the evidence and *for a directed verdict is not a proper method of questioning the legal sufficiency of the declaration as a pleading* (citing authorities).

"*Pleading to the merits in an action for negligence waives the objection that the declaration fails to aver that defendant had notice of the alleged defect and that plaintiff was without notice thereof* (citing authority). * * * * * * *

"It has been held, however, that the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation, and *if he neglects his duty in this respect so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. Currier v. Boston Music Hall Ass'n*, 135 Mass. 414. That case was cited with approval in *Hart v. Washington Park Club*, 157 Ill. 9. In the state of the record it is unnecessary for us to decide whether the doctrine of *res ipsa loquitur* is applicable. In cases of this general nature some courts hold that the doctrine aforesaid applies, while other courts hold to the contrary." (Italics ours.)

See also:

Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 87

Conrad v. Wheelock, (D. C.), 24 F. (2d) 996

Hart v. Martin, (Tex. 1927), 299 S. W. 520

Blackwelder v. Fergus Motor Co., 80 Mont. 374 at p. 387, 260 Pac. 734, holds that if the allegations of a complaint were insufficient, "it will be deemed to be amended to conform to the proof, as such amendment would cause the complaint to conform to the theory on which the case was tried."

LaBonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 Pac. 631, holds that a motion for directed verdict should not be granted if defendant's evidence supplies deficiencies in plaintiff's case. At page 14 of the opinion the Montana Supreme Court said:

> "The rule is equally well settled in this state that where evidence, which might have been excluded as not tending to reflect upon any issue made by the pleadings, has been admitted without objection, it will be given the same consideration as though fully warranted by the pleading of the party offering the evidence, or, in other words, the pleading will be treated as if it had been amended to admit the introduction of the evidence."

Again at p. 15:

> "As defendant permitted this evidence to go in without objection, the court was justified, on the motion for a directed verdict, in treating the complaint as though amended to

admit the introduction of that evidence, and did not err in overruling the motion."

DEPOSITION OF CHARLOTTE LOBLE

The deposition of Charlotte Loble (R. pp. 122-131), standing alone in the record, is sufficient to defeat defendant's motion for a directed verdict.

The deposition was taken pursuant to stipulation of the parties hereto (R. p. 122). It was introduced and read into the record. No objection was made to its admission nor to any interrogatory or answer therein contained.

The *issues of fact* thus presented in this deposition were for the determination of the jury.

In Spaids v. Cooley, 113 U. S. 278, 28 L. Ed. 984, the Supreme Court reversed a case in which a verdict was directed for the defendant. The court there considered a deposition wrongfully excluded and held that *the evidence, on a material issue, therein contained was sufficient to take the case to the jury.*

It is plain from the foregoing authorities that, even when the case is considered on the erroneous theory advanced by the trial judge, the motion for a directed verdict should have been denied.

The Issues of Fact

The record herein presents numerous *issues of fact* all of which were for the jury to determine.

Among those issues of fact, tending to show the

negligence of the defendant, are the following, viz.:

Permitting the charged wire:

(1) *To lie* so near the street;

(2) *To hang down* so near the street;

(3) *To be* so near the street;

(4) *To be upon* the public sidewalk;

(5) *To remain* upon the public sidewalk.

Failure to provide against reasonable and probable contingencies (R. p. 8) including the following:

Failure:

(1) To discover the defect and break;

(2) To have and provide expulsion fuses;

(3) To maintain proper insulation;

(4) To properly inspect the wires, poles and fastenings;

(5) To turn off the current when notified of the defect by the witness Cummings (R. pp. 47, 99);

(6) To repair the defect when notified by the witness Cummings (R. pp. 47, 99);

(7) To have automatic circuit breakers attached to the line;

(8) To repair the defect or turn off the current until *forty minutes* after defendant's own automatic device indicated trouble on the wire (R. p. 88);

(9) To promptly take steps to ascertain the real trouble with the wires when notified at 10:26 o'clock p. m. (R. p. 99);

(10) To so maintain and use the wire so as not to injure plaintiff.

It was likewise for the jury to determine the cause of the breaking of the wire; whether defendant had allowed its wires, insulation, etc., to become defective; whether there was an unprecedented storm or not and if so, whether the storm or known or discoverable defects caused the wire to fall and, if the storm did cause it to fall, whether or not the defendant did not have more than "a reasonable time" after it was notified at 10:26 o'clock p. m. to either turn off the current or repair the defect before the plaintiff was injured at 11:20 o'clock p. m.—*almost one hour later.*

The above are some of the *issues of fact* presented by the record herein.

In Dunagan v. Appalachian Power Co., (C. C. A. 4th), (1928), 23 F. (2d) 395 at p. 398 it is said:

> "The evidence shows that, while the defendant's line had been patrolled a short time before the accident, it had not been given a thorough inspection for a period of about 8 months. Companies handling electricity of the power proven here certainly owe the duty of a thorough inspection at such intervals as are demanded by the business. As to just what would constitute proper inspection in this case the record is not clear, although one of the defendant's witnesses testified that such inspections had been made as was customary."

The defendant, having received notice of the defective condition of the wire from *forty-five to*

fifty-four minutes before the accident and having neglected to turn off the current, is liable, *regardless of the cause which produced the defective condition.*

See:

Zinkiewicz v. Citizens Electric Etc. Co., 53 Pa. Super. 572

In Novak v. Borough of Ford City, (1928), 292 Pa. 537, 141 Atl. 496, the court said:

> "There was no proof of actual notice to the borough that the wire was down, but ample constructive notice. There was evidence that it was thus down two months before the accident, also one month before and two weeks before. There was further the testimony of two ladies * * * that it was down in the same condition the preceding summer. Appellant strenuously contends that the latter should have been rejected as *too remote. This contention cannot be sustained* in view of the testimony tending to show that the position of the wire remained unchanged. * * * On the question of constructive notice it is competent to show the thing complained of had long existed (citing authority); for example, that a highway had long been in disrepair. In the instant case, *whether the position of the wire had been changed since the previous summer was a disputed question for the jury.*" (Italics ours.)

A CASE FOR THE JURY

As was said in Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327 at p. 328,

> "The testimony on the issues in the case is inconsistent and contradictory. Under such circumstances, *it was the duty of the court to submit the case to the jury, whose province it was to reconcile conflicting statements and determine the facts upon which its verdict was based.*" (Italics ours.)

See:

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 at p. 626

McDowell v. Kiehel, (C. C. A. 3rd), 6 F. (2d) 337

In the recent case of Novak v. Borough of Ford City, (1928), 292 Pa. 537, 141 Atl. 496, a boy was injured in a public park by coming in contact with a high voltage wire of defendant which it had suffered to remain in such a sagged condition that it was only about 4 or 5 feet from the ground. In that case the court said:

> "It needs no argument to show that suffering a high-voltage wire to remain so near the ground in a place frequented by the public was evidence of negligence. *Even conceding that the wire was 6 or 6½ feet from the mound,* as stated by a majority of defendant's witnesses, *the question of negligence would still have been a question for the jury.* The trial judge properly instructed them that electricity was a highly dangerous agency and

those using it must exercise the highest degree of care consistent with its practical operation (citing cases). It was defendant's duty to place the wire safely and *keep it so by inspection and repair.* If from any cause it unduly sagged, *the defendant should have found and repaired it*" (citing authority). (Italics ours.)

In Solomon v. Light & Power Co., 303 Mo. 622, 262 S. W. 367, the court said:

"The plaintiff produced substantial evidence tending to show that defendant's wires running through the trees in the 700 block *were permitted to sag;* that *in places* near the trees *the insulation had worn off;* that the green limbs of the trees when the wind was blowing was sufficient to cause the 2300 voltage wire to come in contact with the wire of 110 voltage and communicate to the latter a part at least of the 2300 voltage in excess of 110; *that the above conditions had existed for a sufficient length of time to impart notice to defendant; that sparks had been seen flowing from the wires in said trees* for some time before the death of decedent. *The foregoing facts presented to the jury a typical case of strong circumstantial evidence, upon which they were warranted in returning a verdict for plaintiff, based upon proper instructions.*" (Italics ours.)

In Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610, the court said:

"There was evidence tending to show that the deceased, while walking along the street,

came in contact with this suspended wire and was killed. A discussion of the evidence on this issue in detail would not be fitting. Sufficient to say the issues as to whether death was caused by coming in contact with the wire, and whether deceased by his negligence proximately contributed thereto, *were for the jury.*" (Italics ours.)

In Reynolds v. Iowa Southern Utilities Co., (C. C. A. 8th), 21 F. (2d) 958, it is said:

"There is no contradiction of authority as to the duty of those in control of wires conveying the dangerous agency of electricity to use a high degree of care in insulation and inspection thereof to protect those who may lawfully come in contact with said wires. The rule is concisely stated in Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 162 F. 276, as follows: 'At points or places where people have the right to go for work, business, or pleasure the insulation and protection should be made as nearly perfect as reasonably possible, and the utmost care used to keep them so.' And in 20 Corpus Juris, p. 355, Par. 42: 'The exercise of a sufficient degree of care requires a careful and proper insulation of all wires and appliances in places where there is a likelihood or reasonable probability of human contact therewith, and the exercise of due care to make and keep insulation perfect at places where people have a right to go on business or pleasure.

"It is said that worn or insufficient insulation is worse than none, since it gives a false

appearance of security, but this has been denied. The failure to insulate is not excused by the fact that it may be expensive, or that wires carrying similar currents are not insulated elsewhere. But the fact that the methods of insulation suggested involve a large expense is a matter to be considered in determining whether defendant exercised due care, under all the circumstances of the case, in not insulating its wires. * * *

"As stated in Joyce on Electric Law, Par. 445: 'A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places." (citing numerous cases). * * *

"The court also said that it had been unable to find any evidence of negligence on the part of the defendant in error. A reference to the record does not bear out the claim of no evidence in support of the theory of negligence. *There was testimony that the insulation upon these wires was all that could be provided, and there was testimony to the contrary.* There was also testimony that the wires had a ragged appearance and in this particular tree *snapping and sparks from the*

wires had been observed for a considerable period of time. * * *

"In any event, however, a negligent custom would not excuse defendant in error from exercising a high degree of care to see that wires, known by it to be carrying a dangerous current of electricity, sufficient to injure those coming in contact therewith, through a play place of children of tender years, were properly insulated and so kept. * * *

"*We are satisfied the question of the exercise of proper care in the insulation and maintenance of the wires passing through the tree was a fact one under this record.* * * *

"The question of proximate cause was also one for the jury. * * *

"*The questions here are peculiarly for the jury. We think the court erred in directing a verdict. It was for the jury to say* whether the company had actual or implied knowledge of the use of the tree by children as a play place. If the jury should find such knowledge, then it was for it to say under the evidence whether the defendant in error had exercised the high degree of care demanded by the law in the insulation, maintenance, and inspection of its wires passing through the tree." (Italics ours.)

In the recent case of Salwiecz v. Rutland Light & Power Company and Vermont Hydro Electric Corporation, (Vt. 1928), 142 Atl. 77, the facts are similar to those in the instant case. The trial court *directed a verdict* for the defendants. The

case was reversed by the Supreme Court which said at p. 78:

> "The Vermont Hydro Electric Corporation owned the transmission line. Its electricity escaped and injured the plaintiff. The proof of this established a prima facie case. The plaintiff was on the land of the Vermont State Belt Railway Corporation when injured. Whether rightfully or wrongfully there is immaterial, in view of the Humphrey Case, and did not affect the duty owed him by the transmitter of the electricity. Of course, the defendant *may not* be liable, for it is not an insurer, but *its nonliability could not be ruled on as a matter of law. The case should have gone to the jury* with the Vermont Hydro Electric Corporation the sole remaining defendant." (Italics ours.)

In Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615, at pp. 616, 617, the court said:

> "Whether the prima facie evidence of negligence was met by defendant *was a question for the jury.* Besides, there was affirmative evidence from which, if believed, the jury might have found negligence. There was evidence that the wire fell and was seen emitting sparks thirty minutes before deceased came in contact with it; that one witness called up the trouble station over the telephone three times, the first time being 25 minutes before the accident; that another witness called up about 20 or 25 minutes before the occurrence;

and that each of these witnesses called attention to the dangerous condition and warned that some one would be killed if the wire was not repaired or removed; that the first witness looked in the telephone book each time before calling to be sure he was asking for the right number, etc. * * *

"Under the circumstances of the present case *it was for the jury to determine* whether the defendant was reasonably prepared to promptly respond to emergency calls of this sort, which, according to defendant's own testimony, are liable to happen without any known cause; whether it received notice, or ought to have known of the trouble, through the mechanical devices with which it was equipped according to the evidence; and whether defendant was negligent in turning on current or in failing to shut it off after being warned of danger." (Italics ours.)

CONCLUSION

The facts and pleadings in this case are simple. The *issues of fact* presented by the record are clear cut.

The authorities are numerous. The principles of law applicable are well settled. The decisions of the courts, both state and federal, applying these principles are practically uniform.

A. Should the averments of negligence in the complaint be considered as *general* then all the *issues of fact* presented by the evidence herein are

properly pleaded. This irrespective of the doctrine of res ipsa loquitur.

See:

Smith v. Redman, (1927), 244 Ill. App. 434
Wallace v. U. S., 16 F. (2d) 309 at p. 312

B. Should the averments of negligence in the complaint be considered as *specific*, then the complaint will be treated as having been amended to properly put in issue the material matters introduced in evidence without objection by either party.

See:

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680
(Also cases hereinbefore cited in paragraph 7 of the Summary)

C. Should the case be considered on the theory upon which it was tried by both plaintiff and defendant then the doctrine of res ipsa loquitur is applicable,—the negligence is pleaded in *general terms* and all the contradicted material matters introduced in evidence by either party constitute the *issues of fact* herein.

(See cases hereinbefore cited in paragraph 2 of the Summary)

Considered from any of the above mentioned three angles, *issues of fact* are presented by the record herein.

D. The trial judge recognizes the presence of these issues in the case (R. pp. 93, 108, 109).

Each of these *issues* is supported by substantial evidence. These issues are to be determined by the jury and not by the court.

(See cases hereinbefore cited in paragraphs 1 and 8 of the Summary)

It is respectfully submitted that the motion for a directed verdict should have been denied and that the judgment (R. p. 17) and order (R. p. 140) of the District Court should be reversed.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant,
Helena, Montana.